

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATIONAL LABOR RELATIONS	:	
BOARD, ON BEHALF OF ALLWAYS	:	Docket No.: 15-MC-00028 (NSR)
EAST TRANSPORTATION, INC.,	:	
	:	
Applicant,	:	<u>ALLWAYS EAST</u>
	:	<u>TRANSPORTATION’S</u>
vs.	:	<u>MEMORANDUM OF LAW IN</u>
	:	<u>SUPPORT OF NLRB’S</u>
NATIONAL EXPRESS CORP., d/b/a	:	<u>APPLICATION FOR ORDER</u>
DURHAM SCHOOL SERVICES,	:	<u>REQUIRING COMPLIANCE</u>
	:	<u>WITH SUBPOENA DUCES</u>
Respondent.	:	<u>TECUM</u>
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Always East Transportation, Inc. (hereinafter “Always East”) submit this Memorandum of Law in support of the National Labor Relations Board’s (hereinafter “NLRB” or the “Board”) application for an order requiring compliance with an administrative Subpoena Duces Tecum. Always East, an ‘interested party’ to this litigation, maintains an interest because it is the Respondent in the underlying unfair labor proceeding before the NLRB and has served the subpoena in question issued by the NLRB.

I. FACTS

On May 15, 2014 and August 1, 2014, unfair labor charges were filed with Region 3 of the NLRB.¹ The charges filed by the Union can be found in Exhibit 1 attached to the within Application and the resulting Consolidated Complaint issued by the NLRB on September 30, 2014, attached as Exhibit 2 of the Application. The charges in this case, 03-CA-128669 and 03-CA-133846, were filed by Brotherhood of Teamsters, Local 445 (“Union” and/or “Local 455”) against Allways East. As set forth by the charges, the NLRB and the Union claim that Allways East is a successor to the Respondent herein, National Express Corp., d/b/a Durham School Services (hereinafter “Durham”), and, as such, has violated the National Labor Relations Act (“Act”) by failing to recognize and bargain with the Union. In furtherance of the proceeding relating to the above charges, Allways East issued a subpoena duces tecum to Durham, which was returnable on December 15, 2014, the day that the hearing was to commence before the Honorable Susan A. Flynn, Administrative Law Judge of the National Labor Relations Board. A copy of the subpoena in question is attached to the application as Exhibit 3. Durham failed to file a petition to revoke the subpoena as required by NLRB Rules and Regulations Section 102.31(b) nor did Durham respond to the subpoena on its return date, December 15, 2014.²

None of the information sought in the Subpoena in question was in the possession of Allways East. There has been no dispute that, in fact, Durham was duly served with the Subpoena in question. Moreover, Durham conceded that it did not file a Petition to Revoke the Subpoena Duces Tecum. Thus, all conditions precedent to the commencement of this

¹ All facts are supported by the Affidavit of Ira Wincott and the NLRB’s Application For an Order Requiring Compliance with the Administrative Subpoena Duces Tecum (“Application”) filed herein.

² A subpoena issued and served by the NLRB on Durham was responded to by Durham as represented by General Counsel to the NLRB at the hearing on December 15, 2014.

enforcement proceeding, the Subpoena being duly served upon the Respondent, the Respondent failing to respond to the Subpoena and the Respondent failing to comply with the NLRB Rules and Regulations by filing a Petition to Revoke, have taken place.

On December 16, 2014, Judge Flynn adjourned the trial for General Counsel to commence enforcement proceedings and set forth that she was “shutting down this hearing until there is Subpoena enforcement on the Subpoenas that were filed...there is a Subpoena that’s outstanding that got zero response. No Petition to Revoke, no anything until you intervene and contacted them, and I don’t know what they’re doing now, but they are apparently served with it and they didn’t do anything with it. So that’s not mine, it’s between the Respondent and Durham.”

Incredibly, despite the directive from Judge Flynn to initiate the within Subpoena enforcement proceeding, General Counsel for the NLRB refused to do so. On or about December 17, 2014, Allways East spoke with Durham as a courtesy to Durham and Durham was advised that despite the conversation reviewing the Subpoena, that Allways East was not waiving its rights to seek full enforcement of the entire Subpoena. While Allways East did agree to have a conference call with Durham again on January 7, 2015 to review the status of the document production, Allways East never called counsel on January 7, 2015. Further, as of that date, there had still been no document production whatsoever by Durham, whether formally or informally.

On January 16, 2015, a conference call was held with Judge Flynn, counsel for Allways East, General Counsel and counsel for the Union. Again, as of that date there was no response, formal or informal, by Durham to the Subpoena in question. General Counsel

finally agreed during that conference call to file Subpoena enforcement papers immediately.

As stated above, despite the representation made by General Counsel to the NLRB during the conference call of January 16, 2015, there was still no filing of enforcement proceedings immediately thereafter. However, on or about January 20, 2015, outside counsel for Durham began sending “informal responses” to some of the items requested in the Subpoena. Outside counsel for Durham was further advised that despite their attempts to provide “informal responses”, we still insist that General Counsel comply with the directives of Judge Flynn and file the enforcement proceeding so that any and all issues concerning the Subpoena could be addressed by this Court. Outside Counsel for Durham was advised that since we had been awaiting General Counsel’s compliance with the directive of Judge Flynn for over one month, we were no longer going to waive our rights with respect to the filing of the enforcement proceeding. General Counsel and outside counsel for Durham were advised of this position as a result of outside counsel for Durham’s attempts to provide us with “informal responses” to the Subpoena in question. Again, General Counsel refused to follow the directive of Judge Flynn and waited until on or about January 26, 2015 to advise Judge Flynn that they were finally filing Subpoena enforcement papers. See Declaration of Ira Wincott in Support.

There can be no dispute that the Subpoena in question is served pursuant to a legitimate purpose, the NLRB hearing that has been commenced against Allways East by the NLRB based upon charges filed by the Union; that the information sought may be relevant to the issues in the underlying action; that the information sought is not in the

possession of Allways East and that all of the administrative steps required, service of the Subpoena and Durham's failure to file a Petition to Revoke, have been followed.

Although Durham has now first started to "informally" attempt to comply with the Subpoena, there has not been full compliance with the Subpoena. Durham has still not served a formal response to the Subpoena as required. Instead, outside counsel has been forwarding e-mails allegedly containing information that is responsive to items contained in the Subpoena. Allways East is entitled to a formal response to the Subpoena, properly served upon counsel for Allways East, responsive to all demands. A piecemeal attempt to respond to the Subpoena, by forwarding numerous e-mails with attachments, without explanation, is not and should not be considered a formal response to a Subpoena. Further, despite Allways East's objection to being served responses to the Subpoena piecemeal and via e-mail from outside counsel to Durham, the responses that have been reviewed to date are not fully responsive to the Subpoena served. A detailed analysis of Durham's "informal responses" can be found in the Declaration of Ira Wincott.

II. ARGUMENT

A. This Court has Subject Matter Jurisdiction to Grant the Board's Application For Subpoena Enforcement.

Section 11 of the Act, 29 U.S.C § 161, et seq., grants the Board statutory authority to issue subpoenas, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear. See S.R. No. 573, 74th Cong. 1st Session; Section 6 (c) of the Administrative Procedures Act, 5 U.S.C. § 556(c). The courts have long upheld the power of administrative agencies to issue subpoenas. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct 494 (1945); NLRB v. G.H.R. Energy Corp., 707 F.2d 110 (5th Cir. 1982).

Section 11(2) of the Act (29 U.S.C. § 161(2))³ empowers district courts to enforce Board subpoenas on behalf of parties before the Board. In this matter, Respondent resides and transacts business within this judicial district. Accordingly, under Section 11(2) of the Act, the Court has jurisdiction to order compliance with the subpoena.

B. The Board's Application Procedure for Subpoena Enforcement is Appropriate.

The Board's subpoena-enforcement proceedings, authorized by Section 11(2) of the Act, are summary in nature. See NLRB v. Frazier, 966 F.2d 812, 817-18 (3rd Cir. 1992). Section 11(2) specifically authorizes the Board to make an "application" to the district courts for a summary disposition, on the sole issue of whether or not to enforce the Board subpoena.

It is well established that, in a Section 11(2) enforcement case, the district court should treat the Board's application as a dispositive matter, and not as a pre-trial discovery matter. See NLRB v. Frazier, supra at 817-818; NLRB v. Cable Car Advertisers, 319 F.Supp.2d 991, 995-996 (N.D. Cal. 2004). For, as one court recognized, "[o]therwise, the enforcement proceedings may become a means for thwarting the expeditious discharge of the agency's responsibilities." NLRB v. Interstate Dress Carriers, Inc. 610 F.2d 99, 112 (3rd Cir. 1979). "[T]he question of whether or not to enforce the subpoena is the only matter before the court. The court's decision seals with finality the District Court

³ Section 11(2) of the Act provides:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board is member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

proceeding and is subject to appellate review.” NLRB v. Frazier, *supra* at 818. Indeed, the limited nature of Section 11(2)’s jurisdictional grant to the District Court is a consequence of Congress’ recognition of the importance of providing the Board with a means of prompt enforcement of its subpoenas so that it can effectively carry out its statutory mission.

Consistent with the authorization contained in Section 11(2) of the Act and the need to avoid unnecessary delay of the Board’s processes, the Board’s practice has long been to file an application with the district court to enforce its subpoenas. Section 11(2) specifically provides that a subpoena-enforcement proceeding is commenced by an application, not by complaint or motion. As explained long ago by the Sixth Circuit in Goodyear Tire & Rubber Co. v. NLRB, 122 F.2d 450 (6th Cir. 1941), in a case challenging the Board’s failure to serve a summons and complaint in a subpoena-enforcement proceeding:

[T]he proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the district court is controlled by Section 11(2) of the Act... It is significant that the statute calls for an “application” rather than a petition, for an “order” rather than a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incidence in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of Congress. *Id.* At 451; see also NLRB v. Interstate Dress Carriers, *supra* at 112.

In recognition of the special nature of the Board’s subpoena-enforcement proceedings, courts have not required strict compliance with the requirements of all matters of civil procedure. Federal Rule of Civil Procedure 81(a)(5) provides the authority by which District Court judges, in agency subpoena-enforcement proceedings, allow a less formal application of the Federal Rules of Civil Procedure.⁴

⁴ Fed. R. Civ. P. 81(a)(5) provides, in pertinent part, that the federal rules of civil procedure apply to agency subpoena-enforcement proceedings, except as otherwise provided by statute, rules of the district court, or by order of the court in the proceeding.

Because Section 11(2) of the Act plainly provides that the Board's subpoena cases are to be commenced by application, it follows that this Court should consider the Board's application for an order requiring obedience to its subpoena on behalf of Allways East Transportation Inc. and make a prompt disposition so as to permit the resumption of the hearing before the Board.

The Board's application seeks to obtain an order requiring Respondent's compliance with the administrative subpoena duces tecum.

C. The Court Should Grant the Board's Application for Subpoena Enforcement

"[T]he district court's role in a proceeding to enforce an administrative subpoena is extremely limited." Perez v. Subcontracting Concepts, LLC, 565 Fed. Appx. 25, 26 (2d Cir. N.Y. 2014) quoting E.E.O.C. v. United Parcel Serv., Inc., 587 F.3d 136, 139 (2d Cir. 2009). A district court will enforce a Board subpoena if [1] [] the investigation [was] conducted pursuant to a legitimate purpose, [2] that the inquiry *may be* relevant to the purpose, [3] that the information sought is not already within [its] possession, and [4] that the administrative steps required . . . have been followed" NLRB v. Am. Med. Response, Inc., 438 F.3d 188, 192 (2d Cir. 2006); Perez v. Subcontracting Concepts, LLC, *supra* at 26.

The burden on a party seeking to evade compliance with a subpoena is not a meager one. The party must show that the subpoena serves purposes outside the realm of authority of the issuing agency. If this threshold is not reached, the court should enforce the subpoena. NLRB v. Frazer, *supra* at 819.

Section 11 of the Act provides the Board the power to issue subpoenas requiring the production of evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161(1); See also NLRB v. North Bay Plumbing, 102 F.3d 1005 (9th Cir 1996)

NLRB v. North Bay Plumbing, 102 F.3d 1005 (9th Cir 1996); NLRB v. Interstate Material Corp., 930 F.2d 4,6 (7th Cir. 1991) (describing the Board's broad Section 11 powers).

With regard to enforcing NLRB administrative subpoenas "courts broadly interpret relevancy [], and 'the relevance of the sought-after information is measured against the general purposes of the agency's investigation, which necessarily presupposes an inquiry into the permissible range of investigation under the statute...'" See NLRB v. Am. Med. Response, Inc., supra at 193. Moreover, "the notion of relevancy is a broad one....So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." Sandsend Financial Consultants, Ltd v. Federal Home Loan Bank Board, 878 F.2d 875, 882 (5th Cir. 1989), and cases cited therein; NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 511 (4th Cir. 1996). A party seeking to have a subpoena quashed must establish that "the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the agency." NLRB v. Interstate Dress Carriers, supra at 112. The courts have in fact interpreted Section 11 to permit the production of "everything [the Board] [could seek] from an order compelling discovery" under the Federal Rules of Civil Procedure. NLRB v. Interstate Material Corp., supra at 6.

In the present case, Allways East's subpoena duces tecum seeks documents and information relevant to the inquiry as to whether Always East is a successor to the Respondent herein, Durham, and, as such, has violated the National Labor Relations Act ("Act") by failing to recognize and bargain with the Union. Durham's operations and its history with the union are integral parts of this case. As a result, Durham is in possession of information relevant to the determination of the merits of the charge and completion of the

trial. Durham cannot now deny that the information sought is not relevant as it has now attempted to comply with the subpoena at issue.

At the onset, Respondent elected to ignore Allways East's subpoena, which was returnable on December 15, 2014, the day that the hearing was to commence and failed to timely submit a petition to revoke. Respondent only attempted later on to provide documents to Allways East in response to the subpoena. However, Respondent's response was both insufficient and improper. Respondent's contumacious conduct has impeded and continues to impede the parties in this action before the Board.

CONCLUSION

For the reasons set forth above, in the Board's Application and the Declaration in Support of Ira Wincott, Allways East Transportation Inc. respectfully submits that the administrative subpoena at issue should be enforced and the relief sought in the Application should be granted.

Dated: February 13, 2015

By: /s/

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